

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

Affidavit

76-4057

To be argued by
THOMAS H. BELOTE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-4057

LUIS MARIANO VALENCIA-BURGOS,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF
IMMIGRATION APPEALS

RESPONDENT'S BRIEF

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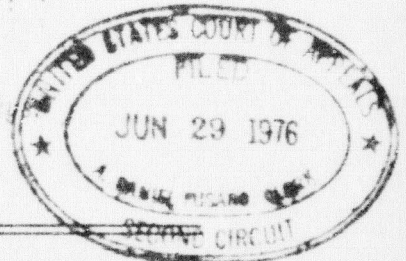


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—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

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RESPONDENT'S BRIEF

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Luis Mariano Valencia-Burgos ("Valencia-Burgos") petitions this Court for review of an order entered by the Board of Immigration Appeals (the "Board") on January 21, 1976 denying his motion to reopen his deportation proceedings. That order dismissed the petitioner's appeal from the order and decision of an Immigration Judge denying the alien's motion to reopen in order that he might apply for the discretionary relief of suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254(a), and affirmed the decision of the Immigration Judge. The Immigration Judge found that Valencia-Burgos had failed to meet all the criteria for Section 244(a) relief, in particular, that provision which requires a showing that his deportation would result in "extreme

hardship" to him, or to his spouse, parent, or child, who is a citizen of the United States or a lawful resident alien.

The petitioner contends that the Board's order should be set aside because it was arbitrary, capricious and an abuse of discretion as well as being a denial of due process of law. This petition, seeking review of the Board's order, was filed on February 20, 1976. Since the date of filing this petition, the alien has enjoyed the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act, 8 U.S.C. § 1105a.

Statement of Facts

The petitioner is a 26 year old alien, a citizen and native of Colombia who entered the United States on July 4, 1968 as a nonimmigrant student. He was authorized to remain in this country until January 30, 1969. However, he remained beyond his authorized period without permission and became employed in violation of his nonimmigrant status in October 1969 (T. 7).^{*} Petitioner was located by the Service on May 6, 1975. Deportation proceedings were instituted against him on that date by the issuance of an order to show cause, and notice of hearing and warrant for arrest of alien (T. 17). A hearing in deportation proceedings was held on May 7, 1975 (T. 5), and on that date the Immigration Judge entered an order finding the alien deportable and granted him, on his application, the privilege, under Section 244(e) of the Act, 8 U.S.C. § 1254(e), of departing the United States voluntarily on or before July 15, 1975. In the alternative deportation to Colombia was ordered in the

^{*} References preceded by the letter "T" are to the tabs affixed to the certified administrative record filed with the Court.

event he failed to depart when required. Appeal from that order on May 7, 1975 was waived and, accordingly, the order became final pursuant to 8 C.F.R. § 242.20 (T. 16).

By papers dated July 11, 1975, four days prior to the expiration of his voluntary departure period, the alien, by his present counsel, moved to reopen his deportation proceedings for the purpose of applying for suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254. In support of his motion, petitioner furnished an application for suspension of deportation, his employment records, tax returns for the years 1969 to 1974, a good conduct certificate, an affidavit of his sister Nury Vargas, an affidavit of his employer attesting to the employment of petitioner since 1969 and to petitioner's good moral character, and two affidavits from United States citizens attesting to petitioner's good moral character.

On October 10, 1975 the Immigration Judge entered a written decision denying petitioner's motion to reopen (T. 5). The Immigration Judge found that "the hardship if any on the [petitioner's] sister is certainly of a minimal nature" since the sister is employed and her husband is capable of being employed (T. 5). The decision also noted that petitioner had accrued the required seven years physical presence during the voluntary departure period previously granted him.

Petitioner appealed the October 10, 1975 decision to the Board and on January 21, 1976 the Board affirmed the decision of the Immigration Judge denying the motion to reopen and dismissed the appeal. A warrant of deportation was issued on January 30, 1976 and by notice dated February 17, 1976 the petitioner was directed to report for deportation on February 23, 1976. This petition for review was filed on February 20, 1976 and petitioner has enjoyed the statutory stay of deportation which accompanies the filing of a petition.

Statement of the Issues

Whether the order of the Board of Immigration Appeals, affirming the decision of the Immigration Judge and denying the petitioner's motion to reopen his deportation proceedings, was arbitrary, capricious and an abuse of discretion.

Relevant Statutes

Immigration and Nationality Act, 63 Stat. 163 (1952) as amended:

Section 244(a), 8 U.S.C. § 1254(a), in pertinent part, provides:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and——

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * *

Relevant Regulations

Title 8, Code of Federal Regulations:

§ 103.5 Reopening or reconsideration [before an Immigration Judge].

Except as otherwise provided in Part 242 of this chapter, a proceeding authorized under this chapter may be reopened or the decision made therein reconsidered for proper cause upon motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision. . . . If the officer who originally decided the case is unavailable, the motion may be referred to another officer. A motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent. . . .

§ 242.22 Reopening or reconsideration [before an Immigration Judge]

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of § 103.5 of this chapter. The special inquiry officer may upon his own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he had made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this chapter. . . . A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing. . . .

ARGUMENT

The Board of Immigration Appeals did not abuse its discretionary authority in declining to reopen the deportation proceeding to permit the alien to apply for suspension of deportation.

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,* has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 242.22, with respect to motions brought before an Immigration Judge provides in pertinent part that motions to reopen "will not be granted unless the Special Inquiry Officer [Immigration Judge] is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." Additionally, 8 C.F.R. 103.5 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material."

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Immigration Judge and then the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted

* Section 103(a) of the Act, 8 U.S.C. § 1103(a).

as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner—the reopening of a hearing for the purpose of applying for a suspension of deportation—and the evidence he offered in support of his motion.

B. Suspension of deportation.

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. § 1254(a), is the ultimate form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General must be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. § 1254(c); *McGrath v. Kristensen*, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements contained in the statute. He must establish that he has been physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.*

* The qualifying relative must be the alien's spouse, child or parent. Section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1).

The applicant for suspension of deportation has the burden of showing that he meets these prescribed conditions. 8 C.F.R. 242.17(d); *Kimm v. Rosenberg*, 363 U.S. 405 (1960), *rehearing denied*, 364 U.S. 854; *Brownell v. Cohen*, 250 F.2d 770 (D.C. Cir. 1957). If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable exercise of discretion. *Hintopoulos v. Shaughnessy*, *supra*; *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Ng v. Palliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860. Accordingly, when making his motion to reopen, it was incumbent upon this petitioner to offer evidence to show not only that he was statutorily eligible but that he merited the extraordinary relief he sought as a matter of discretion.

C. The evidence offered in support of the alien's motion to reopen did not warrant reopening.

The Immigration Judge before whom the motion to reopen was pending was obliged to weigh the facts before him against the requirements of Section 244(a) of the Act, 8 U.S.C. § 1254(a), and Sections 103.5 and 242.22 of Title 8, C.F.R. In all, he had to determine whether the motion stated *new* facts to be proved at a reopened proceeding; whether those facts that were presented were *material* and were *not available and could not have been discovered or presented* at the original hearing; and whether the alien made a *prima facie* showing that he had been in *continuous residence for seven years* prior to applying for suspension of deportation, that he was of *good moral character* and that his deportation would result in *extreme hardship* to him or a spouse, parent

or child who is a citizen or resident of the United States. It was clear from the evidence that petitioner could not meet the extreme hardship test, since the only hardship claimed by petitioner was hardship to his resident sister, which is certainly not one of the familial relationships provided for in section 244(a)(1).^{*} Nor at the time of the Board's *de novo* consideration of this matter was the evidence any more compelling.

In passing on cases within its jurisdiction, the Board is expressly authorized to exercise any of the Attorney General's authority and discretion appropriate and necessary to the disposition of a case. 8 C.F.R. § 2.1(d). It has long been the practice of the Board to make its own determinations on questions of law and fact and on whether discretionary relief should be granted. *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 278 n.2 (1966); *DeLucia v. Immigration and Naturalization Service*, 370 F.2d 305, 308 (7th Cir. 1966), *cert. denied*, 386 U.S. 912. In the present case where the regulations require an evaluation of proffered evidence before a motion to reopen can be granted, the Board properly exercised its discretionary authority in dismissing the appeal from the decision of the Immigration Judge.

The record of proceedings in this case is barren of any evidence demonstrating any outstanding equities in favor of this petitioner or showing that his deportation would result in an extreme hardship as that term is used in reference to Section 244(a) of the Act, 8 U.S.C. § 1254(a). The Immigration Judge and the Board simply

^{*} Petitioner's contention that extreme hardship to his resident alien sister satisfies the test of Section 244(a)(1) is neither supported by the clear, unequivocal language of the statute nor by the cases cited by petitioner in support of his contention. In none of the cited cases does the Court address the issue of which familial relationships fall within the statutory language. Rather, in each case the Court utilizes the phrase "close family ties" simply as a paraphrase of the statutory language.

did not abuse their discretion in denying a motion to reopen. Petitioner's suggestion that he was denied procedural due process in not being able to develop the issues further at a reopened deportation hearing cannot be seriously considered. In all respects the deportation proceeding more than satisfied the requirements for procedural due process.* A hearing based on a written statement of the charges was held on notice to petitioner. He was afforded the opportunity to present any additional evidence in support of his motion to reopen. The evidence itself was insufficient to show any likelihood that petitioner could successfully prove the requisite extreme hardship at a reopened hearing and accordingly his motion to reopen was denied. The petitioner, of course, cannot require that deportation proceedings be reopened merely by moving to reopen. If he could, he would be able to successfully frustrate the deportation procedure permanently. See *Cheng Kai Fa v. Immigration and Naturalization Service*, 386 F.2d 751, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968).

This Court should not countenance further delay in deportation occasioned by procedural gimmickry. Petitioner knew he could not prevail on an application to suspend deportation when deportation proceedings were first initiated. He knew he had not met the seven year requirement and at that point, offered the privilege of voluntary departure, he should have left the country. Through counsel, he embarked, instead, on a course designed to frustrate the clear path that the law envisioned he was to take. Rather than fruitlessly appeal the initial Immigration Judge's decision, counsel, only four days before the alien was to depart, filed the motion to reopen. As the record reflects, the information submitted was inadequate. Throughout, petitioner had full opportunity

* See generally Section 242 of the Act, 8 U.S.C. § 1254; Gordon and Rosenfield, *Immigration Law and Procedure*, Vol. 2, § 8.12b, p. 8-82.

to present any evidence on hardship that he wished. In fact he availed himself of this opportunity before the Immigration Judge on the motion to reopen, and, after being appraised by the Immigration Judge that the information was inadequate, he could have and should have submitted more information to the Board for its *de novo* review. None, however, was proffered. Counsel's claim now that a hearing on the application was necessary is misguided. Neither the Immigration Judge nor the Board of Immigration Appeals is required to hold a hearing when reviewing a motion to reopen, *Cheng Kai Fu v. Immigration and Naturalization Service*, *supra*; see 8 C.F.R. §§ 3.1(d)(1-a) and 3.1(e), nor should the Board exercise its privilege to request additional information from a petitioner in its *de novo* capacity when the information before it reveals no need for it.

Petitioner's counsel now asks this Court to ratify the dilatory administrative tactics and force INS to reevaluate the very material which it has already properly rejected. This should not be condoned. The petition should be dismissed.

D. Scope of review.

The only issue presented in this petition for review is whether or not the Board abused its discretionary authority in denying the petitioner's motion to reopen. As we have indicated, the grant or denial of a motion to reopen is discretionary. *Novine v. Immigration and Naturalization Service*, 371 F.2d 272 (7th Cir. 1967). The scope of judicial review is extremely narrow. *Muskardin v. Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *Zupicich v. Esperdy*, 319 F.2d 773 (2d Cir. 1963). Where, as here, the facts asserted by petitioner would not result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. *Cheng Kai Fu v. Immigration and Naturalization Service*, *supra*.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York)

ss

CA 56-4057

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
_____ day of _____, 1976 she served ^{two} ~~a~~ copy of the
within Respondent's Brief

by placing the same in a properly postpaid-franked envelope
addressed:

Shoda E. Fryer, Esquire
415 Madison Avenue
New York, New York 10022

And deponent further
says she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian J. Bryant

20th day of June, 1976

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-252838 Queens County
Term Expires March 30, 1977